

SCIENTIFIC GAMES CORPORATION, et al.,)	Case No. 2:17-cv-00343-JAD-NJK
Petitioner(s),)	ORDER
vs.)	(Docket Nos. 44, 45, 46, 62)
AGS LLC,)	
Respondent(s).)	

I. BACKGROUND

¹ The Court will hereafter cite to the joint statement as “J.S.”

1 for antitrust monopolization claims arising out of alleged sham patent litigation (“Illinois Action”). *See*,
2 *e.g.*, J.S. Exh. 3, at ¶¶ 25, 26. Respondent (“AGS”) is a non-party to the Illinois Action, but entered into
3 an intellectual property agreement with one of the Illinois Plaintiffs. *See* J.S. Exh. 4. Scientific Games
4 seeks discovery through subpoena largely targeted at AGS’ involvement in developing and selling a card
5 shuffler based on the technology acquired through the intellectual property agreement. *See* Docket Nos.
6 10-2 (subpoena for deposition), 10-4 (subpoena for documents), 60 (narrowing document requests).

7 **II. STANDARDS AND ANALYSIS**

8 The parties have narrowed their discovery dispute to four requests for production and four
9 deposition topics. *See* J.S. at 7-35. The Court previously outlined the standards that will be applied to
10 the disputes at issue, Docket No. 57, and incorporates those standards herein.²

11 **A. Requests for Documents**

12 There are four requests for documents that remain at issue. Narrowed Document Request No.
13 2 seeks documents sufficient to show AGS’ sales projections for automatic card shufflers. J.S. at 7.
14 Narrowed Document Request No. 3 request seeks documents sufficient to show AGS’ current and
15 projected costs for manufacturing automatic card shufflers. J.S. at 12. Narrowed Document Request
16 No. 4 seeks document sufficient to show when AGS’ automatic card shufflers will be sold and in what
17 quantity. J.S. at 16. Narrowed Document Request No. 6 seeks documents sufficient to show all
18 projections related to future payments and royalties to Shuffle Tech. J.S. at 20.

19 **1. Narrowed Document Requests Nos. 2, 3, and 6**

20 Among other objections, AGS makes a confidentiality argument with respect to these three
21 document requests. A third-party can object to the production of subpoenaed documents to the extent
22 that doing so discloses “a trade secret or other confidential research, development, or commercial
23 information.” Fed. R. Civ. P. 45(d)(3)(B)(i). As outlined by the Court previously, the party resisting
24 discovery bears the initial burden of establishing that the information at issue is protected as a trade
25 secret or confidential commercial information. If that burden is met, the burden shifts to the party

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27 ² The Court will not address herein every objection or argument made as to every discovery request
28 or deposition topic in dispute. To the extent any objection or argument is not consistent with the outcome
of this order, it was found to be unpersuasive.

1 seeking discovery to establish a “substantial need” for the information. When a substantial need has
2 been shown, courts will determine whether procedures exist to mitigate any burden or prejudice to the
3 non-party. *See* Docket No. 57.

4 In this case, AGS filed declarations indicating that it has treated the subject information as highly
5 confidential (J.S. Exh. 9 at ¶ 13) and that it risks competitive disadvantage through disclosure of that
6 information to a competitor that already enjoys a large market share (J.S. Exh. 10 at ¶ 5). Scientific
7 Games contends that this showing is insufficiently detailed for AGS to meet its initial burden. *See, e.g.,*
8 J.S. at 11. The Court disagrees. As an initial matter, confidential projections about product
9 development, including sales, costs and royalties, appear to be well within the scope of information
10 deemed by the Ninth Circuit to be a trade secret or confidential commercial information. *Cf. Apple Inc.*
11 *v. Samsung Elecs. Co.*, 727 F.3d 1214, 1222 (Fed. Cir. 2013) (discussing *In re Elec. Arts, Inc.*, 298 Fed.
12 Appx. 568, 569 (9th Cir. 2008)). Moreover, courts have presumed that disclosure to a competitor is
13 more harmful than disclosure to a noncompetitor. *See, e.g., American Standard, Inc. v. Pfizer, Inc.*, 828
14 F.2d 734, 741 (Fed. Cir. 1987) (collecting cases). In the context of this case, the Court finds AGS has
15 satisfied its burden of establishing the confidential and commercially sensitive nature of the documents
16 requested. *See, e.g., id.* (based on affidavit similar to the declarations submitted here, rejecting
17 arguments that showing was insufficiently developed).

18 Because AGS has satisfied its initial burden, “the burden shifts to the requesting party to show
19 a ‘substantial need for the testimony or material that cannot be otherwise met without undue hardship.’”
20 *Gonzales v. Google, Inc.*, 234 F.R.D. 674, 684 (N.D. Cal. 2006). Courts have discussed “substantial
21 need” as requiring a showing that “the requested discovery is relevant and essential to a judicial
22 determination of [the party’s] case.” *Id.* at 685 (citing *Upjohn Co. v. Hygieia Biological Labs.*, 151
23 F.R.D. 355, 358 (E.D. Cal. 1993)). The information must be “reasonably necessary for a fair opportunity
24 to develop and prepare the case for trial.” *Aevoe Corp. v. AE Tech Co.*, 2013 WL 5954570, *3 (D. Nev.
25 Nov. 6, 2013). “The determination of substantial need is particularly important in the context of
26 enforcing a subpoena when discovery of a trade secret or confidential commercial information is sought
27 from non-parties.” *Gonzales*, 234 F.R.D. at 685 (citing *Mattel, Inc. v. Walking Mountain Prods.*, 353
28 F.3d 792, 814 (9th Cir. 2003)).

1 In this instance, Scientific Games has failed to satisfy its burden. With respect to Narrowed
2 Document Request No. 2, Scientific Games contends without elaboration that they “have a substantial
3 need for the information that cannot be otherwise met without undue hardship because the quantity of
4 shufflers [AGS] projects it will sell bears directly on Petitioners’ market power and competition in the
5 casino card shuffler market—i.e. Petitioners’ alleged monopolization of the casino automatic shuffler
6 market—which are central issues in the Illinois Action.” J.S. at 11.³ With respect to Narrowed Document
7 Request No. 6, Scientific Games states with even less elaboration that “Petitioners have a substantial
8 need for the information that cannot otherwise be met without undue hardship.” J.S. at 23.⁴ Scientific
9 Games fails to actually explain why that is so, and its *ipse dixit* is not sufficient to carry its burden of
10 establishing a substantial need for the confidential commercial information at issue. *See, e.g., Kor*
11 *Media Group, LLC v. Green*, 294 F.R.D. 579, 582 n.3 (D. Nev. 2013) (courts may deem waived
12 arguments that are not meaningfully developed).

13 In short, AGS has satisfied its burden of establishing the documents requested through these
14 three requests contain confidential, commercially sensitive information. Scientific Games has not
15 satisfied its subsequent burden of establishing that it has a substantial need for the information.⁵

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17 ³ The discovery regarding projections of sales and costs is not essential to the resolution of the
18 Illinois Action as to damages mitigation/offset because (1) AGS has agreed to disclose its actual payments
19 to the Illinois Plaintiffs and costs, *see, e.g.,* J.S. at 5 (representing that “AGS remains willing and able to
20 provide a report as to ACTUAL payments and expense” (emphasis in original)), and (2) any future royalty
21 payment obligation ceases by contractual agreement in early 2018, J.S. at 3; *see also* J.S. Ex. 4 at
22 AGS300105. Consistent with AGS’ concession, to the extent any automatic card shufflers are manufactured
and/or sold to which royalties or other payments are owed under the existing intellectual property agreement,
AGS is **ORDERED** to produce to Scientific Games documents sufficient to show those payments and its
expenses within 14 days of the payment made pursuant to the intellectual property agreement.

23 ⁴ Conflating relevance and substantial need, Scientific Games’ argument with respect to Narrowed
24 Document Request No. 3 is similarly bare. *See* J.S. at 16 (indicating that “as discussed above” in addressing
25 relevancy, there is a “substantial need” for information sought) *but see Aevoe*, 2013 WL 5954570, at *3
26 (discovery of confidential information is not permitted without a showing of substantial need even if a
showing is made as to relevancy).

27 ⁵ Having failed to satisfy its burden of showing substantial need, the Court need not opine on whether
28 there are means to protect the information if ordered produced. *See, e.g., Aevoe*, 2013 WL 5954570, at *4
n.6 (quoting *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1323 (Fed. Cir. 1990)).

1 Accordingly, the Court hereby **QUASHES** the subpoena as it relates to these particular document
2 requests.

3 2. Narrowed Document Requests No. 4

4 Narrowed Document Request No. 4 seeks documents sufficient to show when AGS' automatic
5 shufflers will be sold and in what quantity. J.S. at 16. AGS' Vice President with intimate knowledge
6 of its records as they relate to this shuffler has stated that there is no current prototype and, as a result,
7 there are no documents showing when any such shuffler will be sold and in what quantity. *See* J.S. Exh.
8 9 at ¶¶ 20, 27, 29.⁶ Given that there is no sufficiently developed shuffler such that a release date or
9 quantity has been set, it would not be possible for AGS to produce documents sufficient to show when
10 the shuffler will be sold and in what quantity. Accordingly, the Court hereby **QUASHES** the subpoena
11 as it relates to this particular document request.⁷

12 **B. Deposition Topics**

13 There are four deposition topics in dispute. Deposition Topic 1 seeks testimony regarding AGS'
14 relationship with any Plaintiff in the Illinois Action and/or DigiDeal. J.S. at 24. Deposition Topic 2
15 seeks testimony regarding sales, cost and revenue projections. J.S. at 28. Deposition Topic 3 seeks
16 testimony regarding all payments made by AGS to any Plaintiff in the Illinois Action and/or DigiDeal
17 related to automatic card shufflers. J.S. at 30. Deposition Topic 4 seeks testimony regarding the
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20 ⁶ Although Scientific Games appears to read this document request broadly to require production of
21 documents regarding the state of development of AGS' shuffler generally, *see* J.S. at 19 n. 6 (asserting that
22 documents regarding the fact that the shuffler is not ready for production or sale are responsive to this
23 document request), such a reading is inconsistent with the actual wording of the document request. The
24 document request does not seek projections of a possible timeline for release of the automatic card shuffler,
25 projections of sales quantities, or documents regarding the current state of development. *See* J.S. at 16.
26 Instead, it seeks documents "sufficient to show" when the automatic card shufflers "became or will become
27 available for sale, and in what quantity." *Id.*

28 ⁷ Although AGS included argument in the joint statement as to the confidential nature of this
information, it did not initially object on this basis. *See* J.S. at 16-17. This raises the possibility that
Scientific Games did not have a sufficient opportunity to address that argument with respect to this particular
document request. *See* J.S. at 7 (noting the parties could not agree on circulating their joint statement
sections). Accordingly, the Court resolves the parties' dispute as to this document request on other grounds.

1 revenue or profits of any Plaintiff in the Illinois Action in connection with AGS' development and sale
2 of an automatic card shuffler. J.S. at 33

3 1. Deposition Topic 2

4 Deposition Topic 2 seeks testimony regarding sales, cost and revenue projections. J.S. at 28.
5 AGS objects to this deposition topic on the grounds that, *inter alia*, it requires revelation of trade secret
6 and confidential commercial information. *See* J.S. at 28. For the same reasons as outlined above, the
7 Court hereby **QUASHES** the subpoena as it relates to this particular deposition topic.

8 2. Deposition Topics 1, 3, 4

9 Deposition Topic 1 seeks testimony regarding AGS' relationship with any Plaintiff in the Illinois
10 Action and/or DigiDeal. J.S. at 24. Deposition Topic 3 seeks testimony regarding all payments made
11 by AGS to any Plaintiff in the Illinois Action and/or DigiDeal related to automatic card shufflers. J.S.
12 at 30. Deposition Topic 4 seeks testimony regarding the revenue or profits of any Plaintiff in the Illinois
13 Action in connection with AGS' development and sale of an automatic card shuffler. J.S. at 33. AGS
14 objects to these deposition topics on two primary premises: (1) that deposition testimony is unduly
15 burdensome and duplicative since corresponding documents have been produced, and (2) that expanding
16 the questioning beyond the scope of the topic could implicate trade secret and commercially sensitive
17 information. *See, e.g.*, J.S. at 24-25. Neither of these positions is persuasive.

18 First, the Federal Rules of Civil Procedure permit third-party discovery in the form of both
19 deposition testimony and document production. *See* Fed. R. Civ. P. 45(a)(1)(C). It is well-settled that
20 one cannot avoid facing deposition questioning by simply referring to the production of related
21 documents or the service of other discovery responses. *See, e.g., F.D.I.C. v. 26 Flamingo, LLC*, 2013
22 WL 3975006, at *5-6 (D. Nev. Aug. 1, 2013); *see also Nationstar Mtg., LLC v. Flamingo Trails No. 7*
23 *Landscape Maintenance Assoc.*, 316 F.R.D. 327, 333 n.4 (D. Nev. 2016) (service of written
24 interrogatory answers does not render parallel deposition topics improperly duplicative). AGS has not
25 presented any persuasive reason here why it should not sit for deposition questioning on the three
26 remaining topics in dispute simply because it produced related documents.

27 Second, these three remaining topics in dispute do not directly implicate AGS' trade secret or
28 confidential commercial information and, indeed, corresponding documents have already been produced

1 to Scientific Games. *See, e.g.*, J.S. at 24. Instead, AGS worries that confidential information may be
2 implicated if deposition questioning goes beyond the scope of the topic as written. *See, e.g.*, J.S. at 25.
3 The Court will not issue an order based on speculation that otherwise permissible deposition questioning
4 may veer off course into improper subjects. To the extent questioning at the deposition may delve
5 unexpectedly into commercially sensitive issues, counsel can address that issue at that time.

6 The Court has otherwise reviewed these three remaining topics, and finds that they seek relevant
7 and discoverable deposition testimony. As such, AGS is **COMPELLED** to sit for deposition as to
8 Deposition Topics 1, 3, and 4.

9 **III. CONCLUSION**

10 For the reasons discussed above, the discovery motions (Docket Nos. 44, 45, 46) are hereby
11 **DENIED** as moot. The Court resolves the remaining disputes through the joint statement (Docket No.
12 62) and the subpoenas are **QUASHED** in part and discovery is **COMPELLED** in part.

13 IT IS SO ORDERED.

14 DATED: August 24, 2017

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17 NANCY J. KOPPE
18 United States Magistrate Judge
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